

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 18 March 2009**

**CASE NO: 2009-SOX-00020**

**IN THE MATTER OF**

**MILES HYMAN,  
Complainant**

**v.**

**KD RESOURCES, ET AL,  
Respondents**

**DECISION AND ORDER**  
**DISMISSING COMPLAINT AS UNTIMELY**

This matter arises under the employee protection provisions of the Sarbanes-Oxley Act of 2002, (the Act or SOX), 18 U.S.C. § 1514A, and its implementing regulations, 29 C.F.R. Part 1980, brought by Miles Hyman (Complainant) against KD Resources, et al, (Respondents). Complainant alleges Respondents terminated his employment as a result of engaging in activities which are protected under the Act.

**FINDINGS OF FACT**

Complainant was fired from his employment on June 5, 2008. On November 11, 2008, Complainant filed his complaint with the U.S. Department of Labor (DOL). After an investigation by the Department of Labor's Occupational Safety and Health Administration, Complainant was notified by letter dated December 4, 2008, that his complaint was being dismissed because it was not timely filed. On January 8, 2009, Complainant filed an appeal with the Office of Administrative Law Judges. A Sua Sponte Order to Show Cause as to why his complaint should not be dismissed as not having been timely filed pursuant to the Act was issued on January 16, 2009. Complainant filed a response on February 14, 2009. In his response, Complainant argued that the time for filing of his complaint should be tolled because he was involved in negotiations with Respondents concerning settlement and/or possible reinstatement. Respondents have not filed a response.

Complainant does not dispute the fact that his employment was terminated on June 5, 2008, and that he did not file a complaint with DOL until November 11, 2008. Although Complainant states he is not represented by counsel, his address is C/O David C. Holmes – The Solomon Law Firm.

Complainant asserts that during a meeting on August 23, 2008, he was promised a severance and reemployment. Complainant also references three telephone/email correspondences between the Parties prior to the expiration of the statute of limitations on September 4, 2008.

## DISCUSSION

The Act prohibits discriminatory actions by publicly traded companies against their employees who provide information to their employer, a federal agency, or Congress that the employees reasonably believe constitutes a violation of 18 U.S.C. §§ 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission or any provisions of federal law relating to fraud against shareholders. 18 U.S.C. § 1514A. A SOX complaint must be filed with the Secretary of Labor within 90 days of the alleged violation, i.e., when the discriminatory act has been both made and communicated to the complainant. 18 U.S.C. § 1514A(b); 29 C.F.R. § 1980.103(d).

The time limitation provisions under the Act are not jurisdictional and therefore may be subject to equitable tolling. Sch. Dist. of Allentown v. Marshall, 657 F.2d 16 (3rd Cir. 1981). Equitable tolling focuses on the complainant's inability, despite due diligence, to obtain vital information bearing on the existence of his or her complaint. Santa Maria v. Pac. Bell, 202 F.3d 1170, 1176 (9th Cir. 2000). There are three situations in which tolling of the statute of limitations is proper: (1) when the respondent has actively misled the complainant respecting the cause of action; (2) when the complainant has in some extraordinary way been prevented from asserting his or her rights; or (3) when the complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. Allentown, 657 F.2d at 20. The party seeking the benefit of equitable tolling has the burden of establishing such tolling is warranted. Bost v. Fed. Express Corp., 372 F.3d 1233, 1242 (11th Cir. 2004). Furthermore, ignorance of the law will not generally support a finding of entitlement to equitable tolling. Carter v. Champion Bus, Inc., ARB No. 05-076 (ARB Sept. 29, 2006).

There is no evidence or argument submitted that Complainant was unable, despite due diligence, to obtain vital information bearing on the existence of his complaint. Likewise, there is no evidence submitted that any Respondents actively mislead Complainant respecting his SOX claim, that he was in some way prevented from asserting his rights or that he raised the precise statutory claim in another forum. Complainant only asserts that at a meeting on August 23, 2008, Respondents promised to pay him a substantial severance and that in later emails the settlement offer and terms of his reemployment with the company were discussed.

“The statute of limitations begins to run when the employee is made aware of the employer's decision to terminate him or her even when there is a possibility that the termination could be avoided.” English v. Whitfield, 858 F.2d 957 (4th Cir. 1988); Electrical Workers v. Robbins & Myers, Inc. 429 U.S. 229 (1976). Neither employer participation in settlement discussions nor use of an internal grievance procedure tolls the statute of limitations in a whistleblower case. Beckmann v. Alyeska Pipeline Services Co., 95-TSC-16 (ARB Sept. 16, 1997).

There is no issue and I find that Complainant was terminated on June 5, 2008, and that he did not file a complaint with DOL until November 11, 2008, more than 90 days after his termination. Under the line of cases cited above, the discussions concerning Complainant's settlement and reemployment do not toll the Act's statute of limitations.

I therefore find that the complaint filed with DOL on November 11, 2008, is barred by the 90-day limitations period and that no circumstances exist which would justify tolling the Act's statute of limitations.

Based on the foregoing, the complaint herein is untimely and must be dismissed.

### **ORDER**

The complaint of Miles Hyman is hereby **DISMISSED**.

**So ORDERED.**

**A**

**LARRY W. PRICE  
ADMINISTRATIVE LAW JUDGE**

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**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and

the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).